SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 260

RALPH ELLIOTT SPRINKLE,

Petitioner,

vs.

MOSE E. DAVIS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Reference to Official Report of Opinions Delivered in the Courts Below.

The District Court of the United States for the Western District of Virginia delivered no opinion in rendering judgment affirming the verdict of the jury against the defendant below, now petitioner, for certiorari.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the aforesaid District Court, is set forth in full in the Record, p. 38, Vol. 2.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit on the first appeal will be found in 104 F. (2d) 487.

The opinion of said last named court on the second appeal will be found in 111 F. (2) 925.

As has been indicated, the judgment of the District Court was reversed on both the first and second appeals.

On the first appeal, the judgment against the defendant was reversed because of error in the refusal of the District Court to instruct the jury that under Section 2154 (126) (d) of the Virginia Code, pedestrians are required to cross highways at right angles, and are forbidden to cross them diagonally. We quote from the opinion of the learned Circuit Court of Appeals in the case of *Sprinkle* v. *Davis*, 104 F. (2d) 489:

> "But we are of opinion that the defendant was prejudiced by the refusal of the court, when requested, to instruct the jury that under section 2154 (126) (d) of the Virginia Code pedestrians are required to cross highways at right angles, and are forbidden to cross them diagonally. Section 2154 (126) (d) provides:
>
> 'Pedestrians shall cross only at right angles, and shall not cross highways diagonally; nor, except to board a street car, or to enter a safety zone at right angles, shall they step into that portion of the highway open to moving traffic, at any point between intersections where their presence would be obscured from the vision of approaching drivers by a vehicle or other obstruction at the curb or side.' "

We quote, further, from page 488:

> "Davis, desiring to get his dinner pail that he had left on the south side of the road opposite the cab of the second truck, alighted therefrom on the north side of the road upon the shoulder, went around the rear end of the truck, and walked slowly across the road

diagonally (italics supplied) in a general southwesterly direction.''

It is important to note that the Circuit Court of Appeals aforesaid found in its first opinion delivered in this case that Davis walked ''slowly'' and ''diagonally'' across the road because, as we shall see that among the many contradictions on the part of plaintiff and his witnesses in the third and last trial of this case, Davis testified that he walked at an ordinary gait, not slowly, and one of his witnesses, Shelton, testified that when Davis reached about the center of the road he ''peartened up'' in his walk.

We shall also find when we come to quote the testimony of Davis, and some of the more important witnesses, that he walked, not diagonally across the road, but that he walked straight across, practically at right angles, having stated, as we shall see, that his lunch bucket was opposite the rear of the truck in which he was riding, and that he went straight across to get his lunch bucket.

On the second appeal, as will appear by a perusal of the court's opinion (*Sprinkle* v. *Davis*, 111 F. (2d) 925), the trial court was reversed because of repeated improper remarks and intrusions and conduct during the progress of the trial.

The Circuit Court of Appeals, with characteristic restraint, makes adverse comment upon some of the episodes which marked the conduct of the District Judge at the second trial.

The judicial restraint of the Circuit Court of Appeals, which restraint it is not intended to criticize, does not adequately reflect what occurred at the second trial, and therefore does not adequately reflect the handicap under which the defendant labored, nor the impossibility to expect a verdict under the conditions which prevailed.

Petitioner refers to the first and second trials of this case and to the atmosphere which prevailed by reason of

the judicial attitude in explanation of the fact that it was practically impossible to obtain a verdict from a jury when the course of the trial was punctuated by personal and offensive attacks and reflections upon counsel for the defendant, as prejudicial as they were unjustified. And, aside from the errors complained of at the third trial, it is not an unreasonable implication that the jury which heard the case on the third trial was necessarily influenced by the fact that at the two prior trials other juries had rendered verdicts against the defendant.

Statement of the Case.

In order to avoid repetition, petitioner likewise asks leave to refer to the summary and short statement of the matter involved, under Section I of the petition for certiorari, where a statement of the case will be found, with appropriate references to the record.

As has been repeatedly stated in the petition for certiorari, petitioner's contention is that it is incredible that the plaintiff below could have failed to cross a 20-foot road, walking at an ordinary gait, without being struck by a car which when plaintiff started straight across this 20-foot road from the edge of the macadam, or hard surface, was not in sight at a distance of 670 feet easterly.

Petitioner will show that at no conceivable speed, certainly at no speed sustained by plaintiff's evidence, could Sprinkle's car have reached Davis as he walked across this road from a point more than 670 feet away, that plaintiff's contention is mathematically impossible.

Aside from the contention, which rests in the evidence soon to be considered, the contention of the plaintiff below would appear to be inherently incredible without evidence. The court will judicially know that as one walks there is a rhythmic swing of the motion of the body and of the head; that the eyes will sweep the range of visibility, for no in-

considerable distance, both to the right and to the left, and that therefore Davis must have seen this approaching car if he walked straight across this road, or practically so, as he said he did.

Then there is the notice of an approaching car and the greater the speed, the greater the noise. Thus it may be observed that entirely apart from evidence, the eye and the ear of this man were on the outposts, so to speak, and that it would have been practically impossible for a man possessed of normal faculties, to have been run down by a car under the facts recited in the record of this case.

But petitioner throws these considerations aside, for the moment. Petitioner rests his case of incredibility upon the affirmative testimony of the plaintiff and his witnesses. For the convenience of this Honorable Court, petitioner asks leave to quote liberally from the testimony of the

Plaintiff and His Witnesses.

But, first, that the reference of the witnesses to the "trucks" may be understood, it should be stated that Mose Davis, the plaintiff, had been working along the highway that day, along with some twenty-odd other men. Having finished the day's work, these laborers stopped at the place of the accident in order to pick up some tools and in order that some of the men, Mose Davis, the plaintiff, one of them, might get their lunch buckets, which they had left hanging on trees on the side of the road. The men were in two trucks. Mose Davis rode in the rear truck, that is, in the truck nearest the direction from which Sprinkle's car approached, an easterly direction from the point of the accident, toward the city of Lynchburg, Virginia. In the truck with Mose Davis were, among others, Edward Carter and Thomas Carter, brothers. All of plaintiff's testimony is to the effect that both of these trucks were parked entirely off the hard surface when they stopped at the point of the

accident. We now quote from the testimony of the plaintiff's witnesses:

(a) Mose E. Davis, plaintiff (R. 157, Vol. 1):

"I come on around the truck, and just time I got to the back of the truck Edward Carter told me to bring his bucket, and I told him all right. And then when I got around to the edge of the road I looked down the road, down toward Lynchburg. I didn't see nothing coming. I didn't see nothing coming and then I looked up the road and wasn't nothing coming neither way, and I started on across, and just the time I got just about a step, a half step back off of the hard surface—you know a step before I got off the hard surface—this car come up and struck me."

Cross-examination:

"Q. How did you walk across that road, Mose; did you walk fast or slow?"

"A. I can't remember how I was walking. I imagine I was walking like I always walk."

"Q. Did you walk at an ordinary walk?"

"A. Yes, sir."

* * * * * * *

R. 166, Vol. 1.

"Q. Did you stop on your way across the road?"

"A. No, sir, I didn't stop until the car hit me."

(b) Edward Carter, for plaintiff—R. 134, Vol. 1.

"Q. Now just tell the jury what you saw from the time he (Mose Davis) got out of the truck. Go on and tell what you saw."

"A. Well, he got down from the truck over the wheel, and I told him to get my bucket, and he came around the truck, and I seen him look down the road and he started across the road and the car hit him."

"Q. When you saw Mose look down the road you were facing east weren't you?"

"A. Yes, sir."

"Q. That would be towards Lynchburg?"
"A. I was sitting facing south, but I was looking at him as he came around."
"Q. Now, as you looked at him when you came around there, did you testify you saw Mose look?"
"A. Yes, sir."
"Q. Did you see any car coming at that time?"
"A. No, sir, I didn't see any coming."

(c) Thomas Carter, for plaintiff—R. 150, Vol. 1.

"Q. All right, go ahead and tell the jury just what you know about this accident, what you saw or heard."
"A. I was sitting in the body of the truck, and I got up and looked down the road. I didn't see any vehicle or anything approaching. Mose Davis and my brother were in the truck, and some more boys, I don't know exactly who, and Mose got out and started behind the truck, and I started getting off the truck and I heard the crash and I looked and Mose was in the air."

(d) F. T. Shelton, for plaintiff (R. 86, Vol. 1):

Direct examination:

"Q. What were you doing, Mr. Shelton?"
"A. I had my team down there grading the banks ahead of the other workers."

Again, R. —:

"Q. Did you see when he started across the road?"
"A. Yes, sir."
"Q. Did you know who it was?"
"A. Not at that time I didn't."
"Q. Did you later find out who it was?"
"A. Yes, sir."
"Q. Who was it?"
"A. Mose Davis."
"Q. Now, how far out in the road was he when you first saw him?"
"A. Well, I imagine just a few steps out in the road when he started across."

"Q. How was he going across the road?"
"A. He was walking when I saw him."

Again, on cross-examination, R. 90, Vol. 1:

"Q. Did he continue to walk at the same rate of speed all the way across?"
"A. Well, he might have peartened up his walk a little, Mr. Trader, when he got to about the center of the road."

And, again, R. 92, Vol. 1:

"Q. When you looked down the road, Mr. Shelton, and you saw Mose either when he first started across the road or when he was two to five feet out in the road which of those statements is correct? You say you didn't see any car coming at that time?"
"A. No, sir."
"Q. Wasn't any car in sight?"
"A. I didn't see any."
"Q. How far could you see down the road?"
"A. I wouldn't say. I could see a considerable distance down the road."

Thus Plaintiff and Three of His Witnesses Say That No Car Was in Sight When Davis Started Across This 20-Foot Macadam Road.

How Far Could These Witnesses See?

The important, the decisive question, is: How far could these four witnesses see easterly, in the direction from which Sprinkle's car approached, at the moment when Davis started across this 20-foot macadam road?

Plaintiff offered in evidence a map made by his witness, C. B. Malcolm, a certified engineer, from which it will appear that the point from which plaintiff entered the road is designated point "B", and that the point of maximum sight clearance easterly, where Overstreet stood, another engineer who testified for plaintiff, is designated point "A".

Let us now hear the testimony of plaintiff's engineers as to the distance of visibility which Davis, the plaintiff, had, in the direction from which Sprinkle's car was approaching.

(a) C. B. Malcolm (R. 40, Vol. 1):

"By the Court:

"Q. From what point did you make your test?"

"A. Judge, when we got to the grounds this gentleman told me that the back end of a truck where the accident occurred was 78 feet east of that mail box. We took a steel tape and measured down 78 feet and made a mark, a yellow mark, on the macadam approximately two feet on the macadam. That is indicated at point "B" station "6 plus 62."

"Q. Do I understand your tests were made from that point?"

"A. That point and the extreme point east of same."

"By the Court: Objection overruled."

"A. (continuing) Mr. Adrian Overstreet, the gentleman sitting in the court room, walked down the road at my request."

"By Mr. Hickson:

"Q. You were standing here at "B"?

"A. Yes, sir, and Mr. Overstreet walked east down the road just as far as I could see him and he stopped at a point where if he had walked any further east I couldn't see him, which is shown on the map at a point eight feet east of the initial beginning point, which means that the maximum sight clearance is 662 feet plus 8 feet, or 670 feet."

"Q. How have you identified this point on the map at which you would have lost sight of Mr. Overstreet had he gone any further?"

"A. By point "A," which is approximately 2 feet north of the center line of the macadam at a point at which a man would normally be in the macadam driving a car."

"By the Court:

"Q. What were you doing?"

"A. I stood on "B" and watched Mr. Overstreet walk east down the road and he stopped at the maximum point that I could see him."

"Q. And you stood in the road at point "B"?

"A. Yes, sir."

"Q. How tall are you?"

"A. Five foot, eleven and a quarter, I think."

"Q. All right, go ahead."

"A. I then took a picture of Mr. Overstreet standing on point "A" from point "B".

(b) Adrian Overstreet, for plaintiff (R. 57, Vol. 1).

"Q. When you made these tests with Mr. Malcolm you were down here holding up a handkerchief. You were in the middle of the road?"

"A. No, sir, two feet north of the center."

"Q. You did not have any difficulty in seeing him down there, did you?"

"A. I could see his shoulders and arms."

"Q. You could see his shoulders and arms at 670 feet?"

"A. At 670 feet."

Petitioner would not withhold from the Court the fact that this witness, Overstreet, stated that when these tests of visibility were made by Malcolm and himself, that is, on June 14, 1940, visibility was to some extent obstructed by grass growing on the inside (on the south side) of the road (Sprinkle's line of travel was on the north side of this road)—a condition which does not seem to have disturbed Mr. Malcolm's vision.

It will be borne in mind, however, that while the tests were made on June 14, 1940, this accident occurred on July 2, 1937, three years prior to the date of the tests. The following testimony of the witness is important: (R. 56, Vol. 1).

"Q. Mr. Overstreet, assuming that the vegetation was there when you and Mr. Malcolm made your observations on June 14, you don't know whether as a matter of fact that vegetation was there at the time Mose Davis was injured in 1937?"

"A. I do not know."

At the date of the accident twenty-four laborers had been working all day at and near the scene of the accident clearing away vegetation.

(a) ALBERT J. AKERS, for plaintiff (R. 94, Vol. 1):

"Q. I mean were you in charge of the work?"

"A. I was in charge of the work as foreman."

"Q. You were doing landscape work. Now, approximately how many men were employed on that job that day, the 2nd day of July, 1937?"

"A. About twenty-four."

"Q. Where had you been working on the morning of that day and during the day up until quitting time?"

"A. I had been working on that bank in front of Mrs. Candler's home."

"Q. What time did you go to work that Morning, Mr. Akers?"

"A. 7:30."

"Q. And what time did you quit that day?"

"A. 4:00 o'clock."

"Q. And at the time you quit where were you and your men at work?"

"A. I had about fifteen men this side of Mr. Candler's home about 400 yards and I left about nine men on the bank at Mrs. Candler's home dressing it up."

Petitioner would point out that the said Akers was testifying in the courtroom of the United States District Court at Lynchburg, so that when he said he had fifteen men "this side of Mr. Candler's home about 400 yards" he evidently meant that the men were working 400 yards easterly from the point of the accident, which occurred at Candler's home, and toward Lynchburg. In other words, Akers says that

he had fifteen men working on the shoulders and sides of the road on the day of the accident, at practically the same point where Overstreet says the grass was obstructing vision three year later.

(b) F. T. SHELTON, for plaintiff (R. 86, Vol. 1):

"Q. What were you doing, Mr. Shelton?"
"A. I had my team down there grading the banks ahead of the other workers."

(c) J. W. OVERSTREET, for plaintiff (R. 125, Vol. 1):

"Q. Where were you working before the accident happened, east or west of there?
"A. East of the Candler home."

* * * * * * *

(R. 125, Vol. 1):

"Q. And after you loaded your men and tools down near the Hawkins home and started on up the road, will you tell the jury whether or not Mose Davis was in either truck?"
"A. Yes, sir."

Petitioner will point out that here counsel for the plaintiff assumes that the laborers were "down near the Hawkins home" at quitting time on the afternoon of the day of the accident. The Malcolm plat will show that the Hawkins home was on the inside of the curve on the bank on which the grass was growing which Overstreet said obstructed vision on *June 14, 1940.*

In other words, the force of men was at work at the very spot on July 2, 1937, cleaning up the grass and other vegetation, so that there could not possibly have been any obstruction of vision from this cause on the day of the accident.

(d) Edward Carter, for plaintiff (R. 133, Vol. 1):

"Q. Were you working for the State Highway Department in July, 1937?"

"A. Yes, sir."

"Q. What kind of work were you doing, Edward?"

"A. We was just straightening the road up and digging out the ditches."

"Q. Were you working as a laborer on the road force?"

"A. Yes, sir."

"Q. Who was your boss?"

"A. Mr. Akers."

* * * * * * *

(R. 133, Vol. 1):

"Q. What did you do when four o'clock came?"

"A. Well, when four o'clock came we got our tools and started up the road where some other men were at to pick the other men up and get our lunch pails and some other tools we had up there."

(e) Thomas Carter, for plaintiff (R. 149, Vol. 1):

"Q. What kind of work were you doing and where were you working that day?"

"A. I was working between 500 and 800 yards below the Candler home, east of Forest."

"Q. Were you working as a laborer on the road force?"

"A. Yes, sir, as a laborer."

"Q. Who was your foreman?"

"A. Mr. Akers."

"Q. What time did you finish work that day?"

"A. Four o'clock, I think."

"Q. Where were you when you finished work at four o'clock?"

"A. About 800 yards east of the Candler home."

Petitioner would again emphasize the fact that this witness for plaintiff states that he finished work about 800

yards east of the Candler home. This was slightly beyond the point of maximum visibility. Evidently this group of laborers had been working easterly and had passed over the very terrain or side of the road, cleaning up as they went, to which the witness, Overstreet, referred when he stated that in 1940 grass was growing which obstructed vision to an extent.

(f) And finally, Mose E. Davis, plaintiff (R. 156, Vol. 1):

> "Q. Where were you when four o'clock came to finish your day's work?"
>
> "A. We finished the day's work down below Mr. Hawkins' house."
>
> "Q. What did you do then, Mose?"
>
> "A. Well, we brought the tools up and got in the truck and came up next to Mr. Candler's where the other men was with more tools."

We have been at pains to show by the plaintiff himself and by a number of his witnesses that there were twenty-four men working on the very day of the accident on the road sides between the Candler house and easterly beyond the point where Overstreet said the grass obstructed vision in 1940.

Thus we have a demonstration that there could not have been vegetation which obstructed vision on the day when Davis, the plaintiff, was injured. Thus Overstreet's intimation of obstruction of visibility on July 2, 1937, because grass was growing at the point in question in June, 1940, is set at naught *by the men who cut the grass down on the very day of the accident.*

It may be noted, further, that Edward Carter and Thomas Carter looked down this road, as we have seen from their testimony, not from the road level, nor from a point two feet out on the hard surface, as Malcolm and Overstreet looked (R. 41, Vol. 1).

Edward Carter and Thomas Carter looked down the road easterly in the direction from which Sprinkle's car was coming, *and they looked from the elevation of the body of the truck in which they had been riding;* and from which they had not alighted; and they looked *from the northern shoulder of the highway,* where the trucks *were parked off the hard surface,* from which point the range of visibility must of necessity have been much greater than Malcolm's—yet, these Carter boys saw no car approaching when Davis entered the macadam surface of this 20-foot road which he claims he could not cross without being hit by a car *out of sight at 670 feet when he started across.*

And petitioner deems it worthy of repetition to state that when Davis started across this highway, Sprinkle's car was not in sight at a much greater distance than 670 feet, according to the testimony of Edward Carter and Thomas Carter, for they looked from the elevation of a *truck body entirely on the north shoulder of the road,* and they looked toward a curve to the south, thus giving these two young men a far greater range of vision than Malcolm or Overstreet had—and, therefore, a range of vision far in excess, exactly how much in excess we can not say, of the range of visibility of 670 feet which Malcolm and Overstreet testified that they had from the *ground level two feet out on the highway.*

Mr. Adrian Overstreet Forgets.

Recurring to Overstreet's testimony that in June, 1940, visibility was somewhat obstructed by grass growing on the shoulder of the inside curve, petitioner refers to Record p. 53, Vol. No. 1. Here Overstreet testifies that while his office is in the city of Lynchburg, his residence is west of the scene of this accident, that he passed the point twice a day going to and coming from his work in Lynchburg. It would seem, therefore, that Mr. Overstreet was scarcely frank in

seeking to make it appear that grass growing in June, 1940, might have obstructed the vision of Mose Davis in July, 1937.

As Mr. Overstreet was passing the point in question twice a day in July, 1937, why did he not testify as to the actual conditions which he observed at the time of the accident, rather than to refer to conditions which he observed three years later?

PLAINTIFF PROVES MATHEMATICALLY BY HIS OWN WITNESSES THAT HIS EVIDENCE IS FALSE AND THAT HIS CONTENTIONS ARE INCREDIBLE.

It will be recalled that the plaintiff said (R. 165, Vol. 1) that he walked across this road at an ordinary walking gait, and that he did not stop until the car had hit him (R. 166, Vol. 1).

It will be recalled, also, that plaintiff did not walk the full width of the macadam road before he was struck, for he says (R. 157, Vol. 1):

> "Just about the time I got just about a step, a half step back off of the hard surface—you know a step before I got off the hard surface—this car come up and struck me."

Therefore, the plaintiff actually walked, according to his version, about 18 feet of the road width, while Sprinkle's car was covering more than 670 feet.

Petitioner now refers again to the testimony of C. B. MALCOLM, plaintiff's witness (R. 52, Vol. 1):

> "Q. You are a pretty good mathematician and I would like for you to figure the rates of speed, how long it would take in seconds for a car to travel 670 feet at 40 miles an hour."
>
> "A. At 40 miles an hour a car would go 58⅔ feet per second and that would be a little less than 11½ seconds."

"Q. Figure it at 45 miles an hour."
"A. That would be 10 and a fraction seconds."
"Q. At 50 miles an hour."
"A. Nine and a fraction seconds."
"Q. 60 and 65 and I am through."
"A. 60 miles would be a little less than 8 seconds and 65 miles an hour would be a shade over 7 seconds."
"Q. Mr. Malcolm, are you connected with the State Highway Department?"
"A. Not now. I was in 1920."

Again, MALCOLM (R. 49, Vol. 1):

"Q. What is the speed of an average man walking?"
"A. I would say about three miles an hour."
"Q. What would be a slow walk?"
"A. A tall man will walk faster than a short man because his legs are longer."

"By the Court:

"All that is apparent, but let's get a general idea."

"By Mr. Hickson:

"Q. What would a slow man walk at?"
"A. I would say if a man is not in a hurry he would walk about half as fast as a man who was in a hurry, which would be about two miles an hour."
"Q. For what it may be worth, how long would it require a man walking at two miles an hour to cross the road?"
"A. The same rule applies. It would be a little less than 7 seconds."
"Q. And that road at the point 78 feet east of the Candler mail box is hard surfaced for what width?"
"A. 20.7 feet today."

Re-Cross Examination.

"By Mr. Trader:

"Q. How long would it take an average man to go across that road at 3 miles an hour?"

"A. It would be about 4.4 feet per second and divide that into 20. It is a little over 4½ seconds."

"Q. I believe you made a computation as to how long it would take a car to go 670 feet?"

"A. Yes, sir, at several speeds."

"Q. Let's have your figures at 4 miles an hour for a man to walk 20 feet."

"A. It would be about 3½ seconds."

Yet, again, from Malcolm's testimony (Record p. 48, Vol. No. 1):

"By Mr. Hickson:

"Q. Mr. Malcolm, will you tell the jury how many feet per minute an automobile will travel at 65 miles an hour?"

"A. Speed of any moving object is just slightly less than one and-one half times the miles per hour, in feet per second. In other words 30 miles an hour is 44 feet per second, 60 miles will be 88 feet per second."

"Q. 70, what would that be?"

"A. 102⅔ feet per second."

"Q. At 70 miles an hour it would take an automobile how long to proceed the distance from point 'A' to point 'B' along that highway?"

"A. It would be roughly speaking 6½ seconds."

From the above quoted testimony of the witness, Malcolm, it appears that if Sprinkle's car had been driven at 70 miles per hour, it would cover the 670 feet between point "A" and "B" on Malcolm's map in 6½ seconds. It further appears that at an average walking gait of three miles an hour, the plaintiff would have crossed the entire road width in a little over 4½ seconds.

But even at this maximum estimate of 70 miles an hour, two details must be remembered. The first is that Sprinkle's car *was not in sight* at 670 feet, the maximum point of visibility. Consequently, Sprinkle's car traveled more than 670 feet, and therefore even at 70 miles an hour it would

have required more than 6½ seconds to cover the distance. The second detail is that the plaintiff did not walk the full width of the road, but only about 17 or 18 feet of the full width. If he could have crossed the road in 4½ seconds while Sprinkle was driving 670 feet at the rate of 70 miles an hour in 6½ seconds, the plaintiff would have crossed the entire road two seconds before Sprinkle could have reached him. And when we consider that Sprinkle was driving more than 670 feet, and that Davis was walking less than 20 feet, the margin of difference would be that much greater.

Thus, from the evidence of plaintiff and his own witness, Malcolm, it is impossible that Sprinkle could have hit him. And this means that it is impossible that the testimony of the plaintiff could have been true.

No Credible Evidence of Excessive Speed by Sprinkle.

It is true that Louis Dillon, witness for the plaintiff, testified as follows (Record p. 72, Vol. No. 1):

> "Q. Can you tell the jury from what you heard and saw approximately how fast the Sprinkle car was going?"
>
> "A. I would say he was doing at least 60 miles an hour."

But it is also true that Dillon was driving the front truck which at the time of the accident he stated had been parked off the hard surface. As these two trucks were each 18 or 19 feet in length, as there was a space between the two of about 10 feet, and as the plaintiff testified that he entered the roadway from the rear of the rear or easterly truck, it follows that Dillon was about 50 feet west of the point from which the plaintiff entered the highway, sitting in the cab of his truck with the other truck between him and Davis, and with his back turned to Davis, and consequently with his back turned to Sprinkle's car.

Reference is made to Dillon's testimony (Record p. 139, Vol. No. 1).

From this it appears that Dillon did not see Sprinkle's car at all *until he heard the brakes crying,* which means that the *brakes had been applied* and that the *speed of the car had been arrested.* How, then, could Dillon estimate the speed of a car, seated in the cab of his truck, with his back turned to the approaching car, *which he never saw until after the brakes had been applied?*

GORDON COLEMAN, Traffic Officer, plaintiff's witness (Record p. 24, Vol. No. 1).

The plaintiff did introduce a witness whose testimony is worthy of credence on the subject of the speed of Sprinkle's car. Gordon Coleman is a State Traffic officer. He visited the scene of the accident shortly after its occurrence, in the course of his official duties. He stepped off the length of the skid marks. He said (Record p. 29, Vol. No. 1).

> "Q. How many feet would you estimate it?"
> "A. I think it was over 100 feet."
> "Q. How much over 100 feet?"
> "A. It seems to me it was 110 feet."
> "Q. That was the estimate that you made?"
> "A. Yes, sir."
> "Q. That was the estimate you made at the first trial, Mr. Coleman. Did you not make an estimate as to the speed of the car from those skid marks?"
> "A. I don't recall whether I did or not. You asked me something about how fast I thought the car was going."
> "Q. On page 42 of the record of the first trial I asked you this: 'Q. Would you be able to say from your knowledge whether the car was going fast or slow by reason of those skid marks?' Your answer was: 'A. Well, from the skid marks I would judge it was going around forty miles an hour. He wasn't going fifteen

or twenty miles an hour.' Did you make that statement in the first trial?"

"A. Yes, sir."

Reverting to the testimony of Malcolm, we find that at the rate of 60 miles an hour Sprinkle's car would have covered the 670 feet in a little less than 8 seconds, and that, while the plaintiff at the ordinary gait of three miles per hour could have crossed the road in 4½ seconds. And we find that if plaintiff's witness, Coleman, the traffic officer, is to be believed, Sprinkle's car, traveling at the rate of 40 miles per hour, would require a little less than 11½ seconds to cover the 670 feet.

Mrs. J. L. Candler, for plaintiff (R. 142, Vol. 1).

It is true that Mrs. Candler testifies that Sprinkle's car came up "like a rush of wind". But Mrs. Candler also testified that she was in the kitchen of her residence looking through a small wire screened window, which is shown on a photograph of the Candler residence, filed as an exhibit, and it is likewise admitted that Davis was struck by the right hand side of Sprinkle's car, whereas, Mrs. Candler's view was from the left hand side of Sprinkle's car, thus to an extent putting the car between her and Davis.

It is also true that Mrs. Candler contradicts Davis, that is to say, the testimony of Davis at the third trial, for she states that his position in the road when struck was "about middleway of the last truck, right across in the road" (R. 143, Vol. 1), whereas Davis testified that he went straight across from the rear of the truck to the other side of the road where his lunch bucket was, and that his lunch bucket was opposite a point not more than one foot from the rear of the truck in which he had been riding.

It is worth noting that Mrs. Candler claimed to be an eye witness of this accident. She resided immediately at

the scene of the accident. There were two trials of this case at which she did not appear as a witness, having declined to appear. She might have been summoned, but evidently neither side cared to hazard compulsion of this sort with a witness who declined to testify. It was only at the third trial that Mrs. Candler appeared.

It may be noted, too, that if it be conceded that plaintiff and his other witnesses are telling the truth, and if it be conceded that as has been so insistently contended herein, if under the testimony of the plaintiff and his other witnesses it would have been impossible for Sprinkle to have reached Davis before Davis had crossed the road, it would follow that *no matter how fast Sprinkle was driving*, no matter what speed might be indicated by the perfervid expression—"like a rush of wind"—such testimony would be of no consequence, *because according to Davis and his other witnesses, he would have crossed the road before the car driven, even like a rush of wind, could have reached him.*

The plaintiff proves that he had to walk only ten feet, not twenty, while Sprinkle's car was approaching from a point more than six hundred and seventy feet easterly.

Petitioner respectfully invokes special consideration of the following testimony of plaintiff's witnesses.

(a) Milton (R. 64, Vol. 1):

> "Q. Mr. Milton, these skid marks that you saw on the road, where did they start from?"
>
> "A. They started opposite a little hickory tree that is on the north side of the highway that the bark has been skinned off that I ran over a few days before this accident and got a bawling out about it."
>
> "Q. Those skid marks were right opposite that little hickory tree?"
>
> "A. Yes, sir, mighty close to that little hickory tree."

"Q. Is that the little hickory tree with the handkerchief tied around it shown in plaintiff's exhibit No. 4?"

"A. Yes, sir. I tied that handkerchief on the tree myself."

Again, Milton says:

"Q. Now, where did those skid marks intersect the center line of the road? Do you know that?"

"A. No, I couldn't tell that exactly."

"Q. How far from where they started to the center line? Could you approximate what that distance was from where the skid marks started to the point where they crossed the center line of the highway?"

"A. I could tell approximately. I couldn't say for sure."

"Q. What is your best judgment?"

"A. It would run somewhere around fifty or sixty feet."

"Q. 50 or 60 feet before they crossed the center line?"

"A. Yes, sir."

(b) Adrian Overstreet (R. 14, Vol. 2):

"Adrian Overstreet, recalled.

"Examination by Mr. Hickson:

"Q. Mr. Overstreet, have you scaled the distance from point 'B' to a point on the edge of the highway opposite the 2 inch hickory tree?"

"A. I have not but I will. The hickory tree is 39 feet east of the rear end of the truck, which point is designated as point 'B'."

Akers Confirms.

Akers, foreman and witness for plaintiff (R. 124, Vol. 1):

"Q. Can you tell us how far the car driven by Mr. Sprinkle went after the brakes were applied before the man was struck?"

"A. Well, I put it about half-way the skid marks and the State trooper stepped the skid marks 44 paces, and

he struck him somewhere near half-way the skid marks. I never measured it."

"Q. Around 65 feet?"

"A. Somewhere near that distance."

All of which fits in with Milton's testimony. We have seen that Milton testified that the skid marks ran for approximately 50 to 60 feet in Sprinkle's lane before crossing the center line of the road. We have seen that the skid marks, according to Overstreet, began 39 feet east of the point where Davis entered the highway. We have just seen that Akers testified that the car ran around 65 feet after the brakes were applied, before striking Davis, which is to say that the car ran about 65 feet before striking Davis after the skid marks were made, for it was the application of the brakes which caused the friction which made the skid marks.

Thus, it seems absolutely certain from this testimony of appellee's witnesses *that Sprinkle's car was in its right lane when it passed the point where Davis entered the road.* What we are leading up to is this: That if the car was not in sight at a distance of 670 feet when Davis entered the highway, to cross, and if the car passed in its right lane the point where Davis entered the highway, *then all that Davis had to do to avoid that car was to walk 10 feet across the right lane, and be safe.* Which is *to say, further, that Davis had to walk only 10 feet at an ordinary gait while the car was being driven 670 feet.* Remembering again that the car was not in sight when these four men looked down the road at the time that Davis was entering the highway, it would seem conservative to say that according to the testimony of Davis and his witnesses, that car must have gone at a rate considerably over, but certainly not less than 200 miles per hour in order to strike Davis. And this is another absurdity. And this is yet further evidence that the testimony of Davis and his witnesses cannot be true.

Numerous Contradictions Fatal to Plaintiff's Case.

(a) At First Trial Davis Crossed the Road at a Point 130 Feet East of the Candler Home.

The Candler home is on the south side of the highway by the Candler mail box, from which measurements appear to have been made to the point where Davis is variously alleged to have crossed, is about opposite the Candler entrance, and is on the north side of the highway, from which side Davis entered the road.

We quote first from Adrian Overstreet's testimony; (R. 58, Vol. 1):

> "Q. At that time, Mr. Overstreet, (meaning at a time before the first trial) weren't you measuring the visibility at a point 130 feet east of the Candler mail box?"
>
> "A. Yes, sir, I was measuring from a point 130 feet east instead of 78 feet east."
>
> "Q. Why did you measure that visibility at a point 130 feet east of the Candler mail box? Who gave you those directions?"
>
> "A. The plaintiff in this case."
>
> * * * * * * *
>
> "Q. And you think that accounts for the difference when you made your measurements at the first trial and now because you were measuring from a point 130 feet east of the Candler mail box?"
>
> "A. Yes, sir."

We now quote from Malcolm's testimony (R. 40, Vol. 1):

> "Q. From what point did you make your test?"
>
> "A. Judge, when we got to the grounds, this gentlemen told me that the back end of a truck where the accident occurred was 78 feet east of that mail box, etc."

(b) Overstreet Contradicts Himself.

Overstreet says on direct examination (R. 53, Vol. 1):

> "From a point on the north side of the pavement at point "B" on this map I had an unobstructed view of the road for 535 feet, etc."

Overstreet says on cross examination (R. 57, Vol. 1):

> "Q. You could see his shoulders and arms at 670 feet?" (meaning the arms and shoulders of Malcolm.)
> "A. Yes, sir."

(c) Davis, the Plaintiff, Contradicts Himself as to How He Crossed the Highway.

At the third trial Davis admitted having testified at the first trial to a diagonal crossing of the highway (R. 168, Vol. 1):

> "I walked kind of on an angle across the road. My bucket was kind of up about the cab part, and I had to come around the back end and go at a kind of an angle to get it."

But at the third trial Davis says he crossed the highway practically at right angles, R. 158, Vol. 1:

> "Q. Were you walking up the road or in the road any, or were you walking just straight across to the dinner bucket?"
> "A. I was going straight on across over there to the dinner bucket."
>
> * * * * * * *
>
> "It (the dinner bucket) was pretty near level with the back end of the truck. It might have been up just about a foot, or something another, from the back end of the truck—might have been less."

(d) Akers Admits Having Testified at the First Trial That When He First Saw Sprinkle's Car, it Was 350 Feet Away, R. 106, Vol. 1:

"Q. You understood the question. Did you make that statement at the first trial that when this car was 350 feet away Mose Davis at that time had already gotten to the center of the road?"

"A. I suppose I did make it."

And Akers further admits having testified at the second trial that when he first saw Sprinkle's car, it was right on top of Mose Davis, R. 106, Vol. 1:

"Q. At the second trial, page 116: "Q. Where was the car when you first saw it? A. The car was approaching Mose Davis. It was right on Mose Davis coming right on. Q. When you first saw the car it was right on top of Mose Davis? A. Yes, sir. Q. You are positive of that, are you? A. Yes, sir, I first saw the car and Davis about the same time." Now, which of your statements is correct, Mr. Akers?"

"A. Mr. Trader, I might have said that, etc. * * *"

But at the third trial Akers reverts to his original testimony, R. 105, Vol. 1:

"Q. When did you first see the car?"
"A. At the curve at Hawkins."
"Q. How far was that away?"
"A. Approximately 350 feet."

(e) Akers and Overstreet in Conflict.

The Overstreet here referred to is J. W. Overstreet, not Adrian Overstreet, the surveyor. J. W. Overstreet was the driver of the truck in which the plaintiff, Davis, rode. Akers was sitting beside Overstreet in the cab of his truck.

Akers testifies at the third trial (R. 98, Vol. 1):

"When I heard the screeking of the brakes I was going up to the front end of the truck. When I first

heard the car roaring I run to the front end of the truck and hollered 'Watch this car.' "

But Overstreet, also plaintiff's witness, and seated beside Akers, says (R. 130, Vol. 1):

"Q. Did you see Mr. Akers standing out there?"

"A. No, sir."

"Q. Did you see Mr. Akers at all before the accident happened?"

"A. Yes, sir. Mr. Akers was in the cab with me, and *when he was getting out the accident took place. He had both feet on the ground and one hand on the door.*" (Italics supplied)

"Q. He was getting out of the cab when the accident took place?"

"A. Yes, sir."

"Q. And he would have had his back to the north shoulder of the road at that time, would he?"

"A. Yes, sir."

"Q. If Mr. Akers after that ran in front of your cab would you have seen him?"

"A. Yes, sir."

"Q. Did he run in front of your cab before the accident happened?"

"A. No, sir."

Here is a flat contradiction of Akers by Overstreet, both witnesses for the plaintiff. Will this Honorable Court believe Akers, who testified at one trial that he first saw Sprinkle's car when it was about 350 feet away at Hawkins' curve, and then at another trial said that he did not see Sprinkle's car until it was on top of Mose Davis, or will the Court believe Overstreet, the uncontradicted witness?

The Shattered Glass.

There seems to be no dispute that Mose Davis was hit by the right fender and right hand light of Sprinkle's car.

Milton, for plaintiff (R. 64, Vol. 1):

"Q. Which side of the car?" (meaning which side of the car hit Davis.)

"A. It was the right side of the car, the fender and right headlight."

And again, Milton (R. 62, Vol. 1):

"Q. Approximately whereabouts in the road was Mose Davis with reference to the truck driven by Joe Overstreet at the time he was struck?"

"A. I could't say exactly where he was in relation to the truck at the time he was struck. But from the indications of the stuff falling off from the car, *it was between the back truck and the front one* (italics supplied), that was the dirt and the glass that fell from the automobile."

Joe Overstreet says that the truck driven by him was 19 feet long (R. 127, Vol. 1):

Davis says that he entered the road from the rear of that truck, and went straight across to get his dinner bucket.

But Milton says the shattered glass made by the impact of Sprinkle's car with Davis was found between the back truck and the front truck, that is, approximately 24 feet west of where Davis says he crossed the road, and was hit.

Petitioner respectfully directs the attention of this Honorable Court to the fact that all of the foregoing contradictions in which plaintiff's witnesses have become involved relate to objective matters. Subjective matters that rest purely in slippery memory may become faint with the passing of time. But things that we see we do not so easily forget.

For instance, Davis could readily locate the point at which he crossed the road from the rear of the truck in which he was riding. This point could not be 130 feet from a mailbox at one time and 78 feet from the same mailbox at another time.

And so, Davis could not have crossed the road diagonally according to his evidence at the first trial, which indeed was

the basis of the reversal of the trial court because it failed to instruct that such diagonal crossing was a violation of the Virginia statute hereinbefore cited, and then crossed the road at right angles as he said he did at the last trial. Yet, again, Akers could not have seen and heard Sprinkle's car when it was, as he termed it, "a good 350 or 400 feet away" at the first trial, and at the second trial have seen the same car only when it was practically on top of Davis.

And Akers could not have run out in front of the truck in which Davis had been riding and not run out in front of the truck at the same time and place. Yet Akers says he did and Overstreet, sitting beside Akers, says he didn't.

Finally, if the shattered glass was caused by the impact from the right hand headlight on Sprinkle's car with the body of Davis, and if this glass was found in the road at a point about opposite the space between the two trucks, then Davis did not cross the road at the point that he said he crossed it, or in the manner in which he said he crossed it, at the last trial; because, when Sprinkle's car struck Davis the brakes had been applied, its speed had been arrested. It was soon to come to a complete rest, and the momentum was not sufficiently great to throw particles of glass from 20 to 25 feet ahead. These objective matters furnish a severe test of credibility.

The brother of Davis and a number of other laborers in the truck with the plaintiff, do not testify at any of the three trials.

We quote Edward Carter, witness for plaintiff (R. 136, Vol. 1):

> "Q. Edward, who else was on that truck besides Mose Davis, the truck you were on?"
>
> "A. It was a good gang of us on there. I was on there, my brother and his brother."

"Q. Whose brother?"
"A. Mose's brother."
"Q. What was his name?"
"A. Preston Davis. And a whole lot of other boys were on there too."

Three trials have passed; yet Preston Davis, riding in the truck with his brother, the plaintiff, with every opportunity to have a close-up view of every detail, has never been called as a witness by his brother. And of the "gang" of other laborers who were in that truck, not one has been called as a witness for the plaintiff except the two Carter boys. It is submitted that this is a highly suspicious circumstance.

The Unanswered Question in This Case.

The unanswered question in this case is: Why did Sprinkle apply the brakes 2 feet from the shoulder of the road in his right lane to avoid hitting Davis 2 feet from the shoulder of the road in Sprinkle's left lane?

(a) Sergeant Coleman, witness for plaintiff, (R. 26, Vol. 1):

"Q. Will you describe to the jury where those skid marks began and where they ended?"
"A. They started about 2 feet from the right hand edge of the hard surface going west, and ended up in a driveway leading into a home on the south side of the road going west."

(b) Officer Haden, witness for plaintiff, testifies similarly (R. 33, Vol. 1).

(c) Mose E. Davis, plaintiff (R. 157, Vol. 1):

"By Mr. Hickson:

"Q. You got all the way across except a step or half step to have put you off. Is that your testimony?"
"A. Yes, sir."

Put the car anywhere in Sprinkle's left lane: Is there, we ask again, any rational explanation offered as to this sudden, fevered application of the brakes by Sprinkle, 2 feet from his right shoulder, to avoid hitting Davis, 2 feet from the left, or south, shoulder?

We are aware that the suggestion is made by one or two witnesses, like Akers, who did not see the car until the brakes had been applied, and until the moment of impact, that Sprinkle's car was out of control when he began to skid. Where is there one syllable of factual testimony to support this contention? The day was clear, and the road was clear. Plaintiff's witnesses say the trucks were well off the hard surface, parked on the shoulder. The men were on the shoulder, too; Davis alone was in the road. The road was straight at the point of the impact. There was no approaching car. Then why should Sprinkle have lost control at that particular spot, at that particular moment, just at the right spot and the right moment to make contact with Davis—in a diagonal skid across the road, as if shooting him down? Is there a hint of any suspicious detail, or any adequate explanation? Will appellee be permitted to present his case on pure conjecture, speculation without proof or reason?

Moreover, when Sprinkle's car began to skid, it must have been in a diagonal line not less than 75 feet from where Davis says he was struck. And when the skidding began, the brakes were applied, and the speed had slackened. The car was coming to a stop. It is abundantly proved by plaintiff's witnesses that their attention was attracted by the "crying noise" made by friction when the brakes were applied. Akers heard the noise of the approaching car "a good 350 or 400 feet away."

Will the Court believe that Davis alone did not hear all this? And will the court believe that Davis, one step, or a half step, from the shoulder, could not have sidestepped

this skidding, speed-arrested car? A young man with the agility of youth, with this car bearing down upon him from the other side of the road, making a great noise, as Akers testified, and yet unable to take one step to safety?

In a word, is not the whole explanation too grotesque and fanciful for serious consideration? Is IT NOT EVIDENT THAT THE THING NEVER HAPPENED THIS WAY? Is it not evident that Sprinkle applied his brakes and took this sudden turn to his left because Davis came suddenly into the road in front of him, from an obscured position between the two trucks, in violation of the statute, and that Sprinkle was trying to dodge, and save, the man? This is what defendant's witnesses say. Is there any reason to doubt it?

III.

Specifications of Assigned Errors to be Urged.

The assignment of numerous errors will be found in the record, particularly under the caption "Statement of Points Upon Which Appellant will Rely on Appeal."

The errors thus assigned are believed to be substantial. But all of the errors so assigned, petitioner, upon reflection, believes to be wrapped in the single contention that under his own evidence plaintiff has no case against the defendant below, supplemented by his further contention that plaintiff's evidence not only does not prove his case, but that the testimony of the plaintiff below, and of his chief witnesses, is shown to be false by the contradictions hereinbefore pointed out. Therefore, petitioner feels that the following specifications of errors are sufficient:

(a) The error of the Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for defendant, which motion was made at the conclusion of plaintiff's case in chief.

(b) The error of the said Circuit Court of Appeals in affirming the action of the trial court in overruling defendant's motion to strike plaintiff's evidence and to direct a verdict for the plaintiff, again made, pursuant to the local state practice, at the conclusion of all of the testimony of both plaintiff and defendant.

(c) The error of the Circuit Court of Appeals in affirming the action of the Honorable Trial Court in overruling defendant's motion to set aside the verdict of the jury and to enter judgment for the defendant pursuant to Section — of the Code of Virginia.

(d) The error of the said Circuit Court of Appeals in affirming the judgment of the trial court on the ground that the jury's verdict in favor of plaintiff could not be disturbed.

The development of the basic errors thus assigned will be found in Section III, *supra*, and in Section V, *post*.

IV.

Argument.

Petitioner has not overlooked the suggestion in Rule 27 (f) that the argument shall be preceded by a summary.

Whether petitioner's presentation of his case by putting under the eye of this Honorable Court ample quotations from the testimony of the witnesses will aid the court petitioner does not know. But this has been petitioner's intention, and the quotation of the very words of each witness, found in Section 3 of this brief, and under appropriate captions, has in large measure anticipated the argument and has left little to do under this Section (b), other than the citation of the applicable decisions of the Supreme Court of Appeals of Virginia.

The Circuit Court of Appeals erroneously assumes that as law which petitioner, with deference, insists is not law in Virginia.

It seems appropriate to refer to the only opinion ever delivered by the learned court below upon the merits of

this case. As herein pointed out, this case was argued January 6, 1941, and was decided January 6, 1941. It can scarcely be denied that serious questions were raised in the case, and that arguments were presented orally and by briefs which merited deliberate consideration.

Petitioner respectfully states that he feels that the facts presented in the record and the arguments founded thereon, and the principles of law invoked, entitled him to a studied opinion of the Circuit Court of Appeals, in which the evidence should be discussed and the arguments and the citations should be met—and not merely to the following:

115 F. (2d) p. 625.

"Per CURIAM:

> This is the third appeal by the defendant in this case. On the two prior appeals he complained of the refusal of the District Court to direct a verdict in his favor and of divers other rulings. On account of the other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion and the judgment is therefore Affirmed."

Petitioner further shows that on February 4, 1941, he presented his petition for rehearing, in which he sought to point out what he conceived to be the court's errors (117 F. (2d) p. 938).

It will appear that in its opinion of January 6, 1941, the court below meets squarely the issue which petitioner now presents, with the statement that:

> "On account of the other rulings the judgment was each time reversed, but on each occasion we held that there was sufficient evidence to go to the jury. The evidence on the third trial leads to the same conclusion, and the judgment is therefore Affirmed."

And that in denying the petition for rehearing, the court reaffirms and liberalizes its opinion above quoted when it says in its opinion of February 17, 1941: "It is too well settled to justify discussion that on motion for directed verdict by defendant the evidence must be considered in the light most favorable to plaintiff and that the court will not pass upon the credibility of witnesses."

It may be said that the points upon which the petitioner, then appellant, relied, were not merely the denial of the motion to strike, but a number of other points as well, including the denial of defendant's motion to set aside the verdict of the jury, and to enter final judgment for the defendant, or to grant the defendant a new trial pursuant to Section 6251 of the Code of Virginia.

Petitioner respectfully asks leave to point out, also, that in its opinion, dated June 12, 1939, deciding the first appeal in this case (104 F. (2d) 489), the Circuit Court of Appeals says: "Undoubtedly there is substantial ground for this view of the case (referring to petitioner's case), but we agree with the District Judge that it was a question for the jury to determine under proper instructions."

The Facts on the Third Trial Present an Entirely New Case.

It is important to note that plaintiff's civil engineer witness, C. B. Malcolm, was not a witness at the first or the second trial of this case. Malcolm, the outstanding witness presented by plaintiff for forthrightness and utter candor, appeared for the first time at the third trial.

At the first trial, the distance of visibility was put by Overstreet at 465 feet from the point where Davis entered the road, but Malcolm puts the distance of visibility at 670 feet.

At the first trial Davis crossed the road diagonally, and the Circuit Court of Appeals reversed the trial court because of its failure to instruct the jury that this was con-

trary to the Virginia statute; at the third trial Davis crossed the road practically at right angles.

At the first trial Akers heard Sprinkle's car making a great noise and saw it, too, "a good 350 or 400 feet away." At the second trial Sprinkle's car, when Akers first saw it, was "right on Mose Davis."

At the first trial Akers was out of the truck running out in front of it, warning the men to "Watch this car"; at the third trial J. W. Overstreet, beside whom Akers was sitting in the cab of the truck in which Davis was riding, and a witness for the plaintiff, says that Akers at the time of the accident "was getting out of the truck. He had both feet on the ground and one hand on the door."

And so, without further specifications, the contradictions go, with the result that the third case presented by the plaintiff, if we may be permitted to write with a degree of levity, would not know the first case if it met it in the road.

Yet, with entire deference, it is submitted that the Circuit Court of Appeals in substance treats all three records, all three trials, as one and the same, and, instead of debiting the plaintiff with contradictions which transparently attack the credibility of plaintiff's witnesses, credits the plaintiff on the third trial by the verdicts rendered on the two prior trials, on the second of which trials the learned Circuit Court of Appeals itself reversed the trial court for the sole reason, put in plainer English, but none-the-less truthful, than the Circuit Court of Appeals used, that the atmosphere of the courtroom in which the trial court presided was so permeated with unfair intrusions, unjudicial personal attacks upon counsel, inaccurate statements before the jury at variance with the true facts as found in the record, as to make a fair trial impossible.

Petitioner respectfully joins issue with the Circuit Court of Appeals. Petitioner respectfully submits and does so

on the authority of the decisions of the Supreme Court of Appeals of Virginia that

A Jury's Verdict is Not Sacrosanct.

And if a jury's verdict should ever become sacrosanct, and above the penetrating and discerning eye of an appellate court, it is not too much to say that justice will go out of the windows of our court rooms.

The cases are very numerous in Virginia in which the Supreme Court of Appeals has held that the verdict of a jury which rests upon incredible evidence, which is against the physical facts, which is against facts which the appellate court judicially knows cannot be true, or which is against the plain preponderance of the evidence, will not be allowed.

A broad statement of the rule may be found in the opinion of the court in the relatively recent case (Virginia) of *South Hill Motor Company* v. *Gordon*, 172 Va. p. 193, 200 S. E. bottom p. 644, where the court says:

> "We are aware of the weight which should be given to a jury's verdict, confirmed by a judgment of the trial court. It will be remembered also that we have not hesitated to reverse such judgments when they are not supported by the evidence."

In an older case, the case of *Norfolk & Western Railway Company* v. *Strickler*, 118 Va. 153, 86 S. E. 824, our Supreme Court of Appeals says in words more definitely applicable to the facts of the case at bar:

> "This court has repeatedly declared that courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the Court will not stultify itself by allowing a verdict to stand, although there may be evidence tending to support it,

when the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact."

Again we quote from the case of *Norfolk & Western Railway Co.* v. *Crowe's Admx.*, 110 Va. 798, 67 S. E. 518. Here the court lays down the rule (110 Va. 805):

> "Now, to accept as true the statement of the witness Rutledge, upon which the verdict of the jury can alone be sanctioned, that he and his companion, the deceased, although they had both at 25 feet from the railroad track and again at the crossing looked and listened for an approaching train, and neither saw nor heard the train coming, although neither the sight nor the noise made by the train was obstructed, would, under the circumstances narrated, be to accept as true that which in the nature of things could not be true.
>
> "In such a case, when the fact testified to and the fact necessary to be proven in order to sustain the verdict of a jury could not in the nature of things be true, the authorities clearly held that the verdict should be regarded as against the evidence, and be set aside."

In this case Judge Cardwell, an able Virginia judge, quotes from Moore on Facts, as follows:

> "Courts are not so deaf to the voice of nature or so blind to the laws of physics that every utterance of a witness in derogation of these laws will be treated as testimony of probative value because of its utterance. A court will treat that as unsaid by a witness which in the very nature of things could not be said."

In the case of *Massie* v. *Firmstone*, 134 Va. 450, 114 S. E. 632, the Virginia Court says:

> "A plaintiff who has no case upon his own evidence has no case at all. * * * He therefore cannot complain because we accept his statements as true."

And from page 462, 134 Va., in this same case, the Virginia court says:

> "No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where, as here, it depends on facts within his own knowledge and as to which he has testified."

To like effect is the case of *Thalhimer Bros.* v. *Casci*, 160 Va., 439, 168 S. E. 433, in which latter Reporter the Virginia court says at page 435:

> "Conflicts in testimony are usually for the jury, but this is not always true. When a plaintiff has testified to facts within his own knowledge upon which his case turns, he must abide by his statements. He cannot rest his recovery upon the evidence of others. He cannot ask a jury to believe that his account of the transaction is not to be relied upon. Massie *v.* Firmstone, 134 Va., 450, 462, 114 S. E. 652; Davis Bakery *v.* Dozier, 139 Va., 628, 640, 124 S. E. 411; Bassett & Co. *v.* Wood, 146 Va., 660, 132 S. E. 700; Maryland Casualty Co. *v.* Cole, 156 Va. 707, 158 S. E. 873."

A more recent case to like effect is the case of *Harris* v. *Howerton*, 169 Va. 659, 194 S. E. 696.

And *Harrell* v. *Virginia Electric & Power Co.*, decided on January 13, 1941 by the Supreme Court of Appeals of Virginia, not yet reported in the Virginia Reports, but reported in 12 S. E. (2d), p. 833, reaffirms *Massie* v. *Firmstone*, *supra*, in toto, and wherein the same principle is applied to another negligence case.

In the light of these principles laid down repeatedly by the Supreme Court of Appeals of Virginia, we revert for a moment only to the facts disclosed by plaintiff's own evidence. Let it be remembered that plaintiff's witnesses prove that Sprinkle's car did not cross his right lane of the highway until it was from 10 to 20 feet west of where Davis

says he crossed this highway. From this fact we have argued that Davis manifestly had to walk only 10 feet, or half the width of the highway, in order to clear the path of Sprinkle's car.

Yet, it is the contention, it must be the contention of the plaintiff below that he could not walk these 10 feet while Sprinkle's car was approaching from a point more than 670 feet easterly, for Davis, and his three witnesses, the Carter brothers and Shelton, say that the car was not in sight when Davis started across, and Malcolm, the surveyor witness, says that there was clear visibility 670 feet easterly.

Let it be remembered, too, that if the contention last mentioned be disregarded, according to Malcolm, Davis could easily have walked entirely across the highway before Sprinkle could have reached him from a point beyond the 670 feet of sight clearance, at any conceivable speed at which Sprinkle might have been driving.

Let it be remembered, also, that if these facts be true, it matters not what any other witness may say, whether it be Mrs. Candler, who, residing immediately at the scene of the accident, positively declined to testify at the first and second trials, but had a strange urge to testify at the third trial, or what Akers may say, Akers, the self-contradicted witness, or what any other witness may say—for the reason that if under the testimony of Davis and his supporting witnesses, Sprinkle's car could not possibly have reached him—that there is the matter.

The Presumption of Law in Virginia From Failure to Call an Available Witness.

In *Altavista Cotton Mills* v. *Lane*, 133 Va. 1, 112 S. E. 637, the Virginia court says, subsection (5) of its opinion, bottom page 649, 112 S. E.:

> "Failure to call an available witness possessing peculiar knowledge concerning facts essential to a

> party's case, direct or rebutting, or to examine such witness as to the facts covered by his special knowledge, especially if the witness be favorable to the party's contention, relying instead upon the evidence of witnesses less familiar with the matter, gives rise to an inference sometimes denominated a 'strong presumption of law' that the testimony of such uninterrogated witness would not sustain the contention of the party. 16 Cyc. 1062."

In *Appalachian Power Company* v. *Wilson*, 142 Va. 468, 129 S. E. 277, the Virginia court says, subsection (2) of its opinion, top p. 280, 129 S. E.:

> "Richardson's duties as lineman evidently carried him past the pole after it was placed in the road. He could have explained his lack of knowledge of the location of the pole, if he had no such knowledge, but for some unknown reason the company failed to introduce him as a witness in its behalf. Under such circumstances, the presumption is that his testimony would have been against the interest of the company."

In the case of *Draper* v. *Commonwealth*, 132 Va. 648, 111 S. E. 471, a criminal case, the brother of the prisoner was not produced as a witness. The Supreme Court of Appeals of Virginia said, subsection (4) of its opinion, 111 S. E. 474:

> "If this statement was true, then Clark Draper would have been a material witness for the commonwealth, and, if it was not true, he would have been a material witness for the defendant. Under these circumstances the commonwealth had the right to show that it had attempted to procure Clark Draper as a witness, and, further, to inquire of both the prisoner and his father whether they knew the whereabouts of Clark Draper, and whether they had anything to do with keeping him away from the trial. The fact that

> they did not attempt to produce Clark Draper or account for his absence, when there was evidence before the jury tending to show that he knew material facts in the case, was a matter for fair inference and argument."

The application of the foregoing principles to this case relates, of course, to the failure of Mose Davis, the plaintiff, to introduce his brother, Preston Davis, who was riding in the same truck in which the plaintiff rode and who was necessarily an eye witness of the accident.

And no less do the last cited cases relate to the failure of the plaintiff to introduce as witnesses the other occupants of this truck. Edward Carter, for plaintiff, says, R. 137, Vol. No. 1:

> "It was a good gang of us on there. I was on there, my brother and his brother."

Why was not Preston Davis introduced? Why not some others of "the good gang" on this truck?

Petitioner submits that the failure to produce these witnesses is one of the outstanding suspicious circumstances of a case malodorous with suspicion.

VI.

Petitioner's Evidence in the Court Below.

Petitioner here respectfully directs the attention of this learned Court to the charge of the trial judge to the jury at the third trial. After stating to the jury the contentions of the plaintiff, as herein fully set forth, to the effect that after looking both ways and seeing no car, he started to cross the highway, and was run down by Sprinkle before he could get across (R. 6, Vol. No. 1), the trial judge further charged the jury as follows (R. 6, Vol. No. 1):

> "On the other hand, the defendant Sprinkle contends that he was driving along the highway at a lawful rate

> of speed; that before approaching the scene of the accident he gave warning by blowing his horn; that when he was a very short distance from the two trucks referred to in the evidence, the plaintiff suddenly stepped out from between the two trucks and started to cross the highway a short distance in front of the approaching car; that he had no opportunity to stop the car before reaching the plaintiff, but that he again blew upon the horn of his automobile and applied the brake on his car. He further contends that he turned to the left of the highway because the plaintiff had momentarily stopped near the center of the highway and that he, the defendant, Sprinkle, believed that by turning the car to the left of the highway he could avoid striking him."

The contention of the defendant below, Sprinkle, as stated in the above quotation from the learned trial court's charge, is sustained by the explicit testimony of Sprinkle himself, and of defendant's witnesses, Robert Eustace Scott, Walter E. Arrington, E. W. Smoot, and M. B. Witt.

All of these witnesses, except Witt, say that they saw Davis go out into the road from between the two trucks, in the path of Sprinkle's approaching car; and Witt says he saw Davis, two or three minutes before the accident, standing in the crowd where he, Witt, was standing, behind the front truck, which is the place from which the other witnesses say Davis entered the road, thus directly contradicting Davis.

If the determination of the questions of fact at issue were a mere matter of counting noses, so to speak, it would be futile to present these witnesses for the defendant. If it were a mere matter of conflict between two sets of witnesses, equally credible, it would be likewise futile to ask an appellate court to believe the defendant's witnesses and

to discard the testimony of plaintiff's witnesses, for petitioner does not dispute the principle of law which requires a court to consider the plaintiff's evidence in the light most favorable to the plaintiff, as contended in the *Per Curiam* opinion of the learned Circuit Court of Appeals of February 17, 1941.

But this rule does not apply when the testimony of the plaintiff and his witnesses is incredible, is against the physical facts, is contradicted to such an extent which makes it transparently false, it does not carry the cohesive force of truth.

That this is still the accepted law of Virginia is evidenced by the rather recent case of *Burch* v. *Grace Bldg. Corporation*, 168 Va. 329, 191 S. E. 672, wherein the Virginia court says at p. 677 of the S. E. Report:

> "While broadly speaking, credibility is a question for the jury, the rule is subject to the exception that the courts are not required to believe the incredible * * *"

In a word, petitioner respectfully submits that the credibility of the plaintiff's witnesses has been broken and blasted by the plaintiff's witnesses, that the plaintiff's theory of the case has been exploded by the plaintiff's testimony and that there being no other theory, the theory of the defendant must prevail, namely, THAT DAVIS, THE PLAINTIFF, RAN OUT INTO THE ROAD FROM AN OBSCURED POSITION BETWEEN THE TWO TRUCKS, THAT HE RAN IMMEDIATELY INTO THE PATH OF SPRINKLE'S CAR, THAT SPRINKLE, CONFRONTED WITH THIS EMERGENCY, APPLIED HIS BRAKES AND DIVERTED THE COURSE OF HIS CAR FROM ITS RIGHT LANE TO ITS LEFT LANE, IN A FUTILE EFFORT TO SAVE DAVIS.

AND THAT THE JUDGMENT OF THE LEARNED UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT SHOULD

BE REVERSED AND THAT JUDGMENT SHOULD BE ENTERED IN THIS HONORABLE COURT FOR THE PETITIONER, DEFENDANT BELOW, PURSUANT TO SECTION 6251 OF THE CODE OF VIRGINIA.

Respectfully submitted,

M. F. TRADER,
Lynchburg, Virginia,
S. S. LAMBETH, JR.,
Bedford, Virginia,
Attorneys for Petitioner.

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